85-174

No.

Supreme Court, U.S.
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In The

SUPREME COURT OF THE UNITED STATES

October Term, 1985

KENNETH J. LUNDY

Plaintiff Appellant

v.

UNION CARBIDE CORPORATION a New York Corporation and HARRISONS & CROSFIELD (PACIFIC) Inc., a California, Corporation,

Defendant-Respondent's

On Petition for Writ of Certiorari
To The United States Court of Appeals
For The Ninth Circuit

PETITION FOR WRIT OF CERTIORARI AND APPENDIX

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86 pp

JURISDICTIONAL STATEMENT

QUESTIONS PRESENTED

1. Whether the Ninth Circuit erred in holding that the error of trial court in sending a portion of a learned treatise to the jury, during it's deliberations, over objections of plaintiff's counsel, and in violation of the Fed. Rules of Evidence, particularly FRE 803 (18), and also in violation of an evidentiary stipulation between the parties that was made in open court and was also participated in, by the court, was harmless error and prejudical to appellant.

2. Whether the Ninth Circuit erred in failing to address, on appeal, the breaking of an evidentiary stipulation of the parties, and in so doing deny to appellant the equal protection of the law, under the fourteenth amendment to the United States Constitution, in that appellant was denied not only the protection of the Federal Law but also the law of the forum or sittus State, (Oregon) which is the controlling

law in a diversity case such as this, as it pertains to stipulations or contracts.

3. Whether the appellant has been denied his Constitutional rights, under the Fourteenth Amendment of the United States Constitution, to Due Process, in that he was denied his fundamental and substantive rights to have a stipulation, that was freely entered into at trial, enforced, or given weight and effect by either the trial or appellate courts, both of which failed to state any reason for not doing so.

4. Whether the stipulation was binding on the parties and the court both trial and appellate and what do the terms Binding and Bound mean as they have been applied by this Court, other Federal Circuit Courts and State Courts, as to the binding effect of stipulations on the parties and the fact that courts are bound to enforce them.

5. Whether the Ninth Circuit erred in assigning the standard of review of the error in the trial court as an abuse of discretion rather

than that of Plain Error?

6. Has the Ninth Circuit erred by placing itself in a position as the trier of fact in this case, and in so doing ignored the relevent issues in this appeal and their harmful and prejudicial effect on plaintiff's case?

7. Was the error of the Chart going to the jury harmful and prejudicial to plaintiff?

PARTIES

The parties to the proceedings in the Court of Appeals for the Ninth Circuit were Kenneth J. Lundy as appellant and Union Carbide Corporation, a New York Corporation and Harrisons & Crosfield (Pacific) Inc., a California Corporation, defendants-respondants.

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OPINIONS & ORDERS BELOW

The following documents are listed as apendix to this petition pursuant to Rule 15.1 (d) of this court.

(1) Judgment of the Federal District Court for the District of Oregon dated February 9, 1984 (App. 1).

(2) District Court Orders Denying plaintiff's Motion for New Trial and to Alter Judgment entered March 1, 1984 (App. 2).

(3) The Unpublished Memorandum decision of the Ninth Circuit Court of Appeals dated March 5, 1985 (App. 3).

(4) Order denying Petition for Rehearing and Suggestion for Rehearing In Banc, and Amending Memorandum dated May 23, 1985 from the Ninth Circuit Court of Appeals (App. 4).

(5) The Ninth Circuits Order Denying Plaintiff's Motion for Reconsideration and for Rehearing, dated July 1, 1985 (App.5).

JURISDICTION

This is a civil action for damages, the district court had jurisdiction of this action under U.S.C. 1332 in that the matter in controversy exceeded Ten Thousand dollars, exclusive of interest and costs and is a diversity case in that it is between citizens of different States.

Judgment was entered on this matter in the district court on Feb. 9, 1984, attached as appendix, (App. 1). Record of Order denying plaintiff's Motion for New Trial was entered on March 14, 1984, attached as appendix (App. 2). Notice of Appeal to the Ninth Circuit Court of Appeals was filed on April 3, 1984 in the Federal District Court of Oregon (App. 6). The Jurisdiction of this Court is invoked under 28 U.S.C. §§ 1254 (1)

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves the Due Process and Equal Protection Clause of the Fourteenth Amendment of the United States Constitution which provides that no State shall "Deprive any person of life, liberty or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws". Attached as appendix (App. 7).

STATEMENT OF THE CASE

Introduction and History of the Case

Kenneth J. Lundy originally initiated this matter in July, 1979 against several defendants, claiming injury due to asbestos exposure during the course of his employment with the Borden Chemical Co. The two remaining defendants are Union Carbide Corp. and Harrison's and Crosfield (Pacific) Inc.

On March 2, 1981 a hearing was held on a Motion for Summary Judgment, as to the Statute of Limitations on when plaintiff

knew he had asbestosis. On March 20, 1981, the trial court issued an Opinion and Order granting and dismissing the action. Appeal from Summary Judgment was then taken to the Ninth Circuit Court of Appeals. The Ninth Circuit issued an Opinion and Order on Dec. 28, 1982 reversing the trial court and remanding the case for trial. 695 F.2d 394 (CA9 1982).

The case came to trial on January 31, 1984. The jury returned it's verdict on Feb. 8, 1984 in favor of defendants. (App. 8).

On Feb. 16, 1984 Appellant filed Motion for New Trial and to Alter Judgment. (App.9). Oral argument was had on the Motion on March 12, 1984 with the court indicating that it would not grant the Motion because of policy and dislike for the Rule. Tr. 1114, 1115. (App. 10).

On March 14, 1984 the trial court entered it's order denying plaintiff's Motion

with no further comment. (App. 2).

On April 3, 1984 appellant filed notice of appeal to the Ninth Circuit Court of Appeals (App. 6). Briefs of the parties were filed thereafter and oral argument was heard on Jan. 16, 1985. On March 5, 1985 the Ninth Circuit issued a Memorandum decision, (App. 3), affirming the decision of the trial court. On the 16th day of Mar. 1985 appellant filed a Petition for Rehearing and Suggestion for Rehearing In Banc, pointing out material fact and law apparently overlooked by the court. On May 23, 1985 the Ninth Circuit issued an Order Denying (plaintiff's) Petition Rehearing, Amending and deleting portions of it's Memorandum Order of March 5, 1985. (App. 4).

On June 6, 1985 appellant filed a Petition for Reconsideration and Amended Petition for Rehearing in response to the courts amended Memorandum of May 23, 1985.

On July 1, 1985 the Ninth Circuit issued an Order denying the Petition. (App. 5).

This appeal is based on the error of the district court sending to the jury during it's deliberations, over objections of plaintiff's trial counsel, inadmissable hearsay evidence, in the form of a portion of a learned treatise, in violation of Federal Rules of Evidence, Rule 803(18) and in violation of an evidentiary stipulation between the parties, that was noted and participated in by the court, that none of the medical articles used at trial would go to the jury. (App. 11). Tr. 925, 926.

THE DISTRICT COURT CASE

Plaintiff Lundy claimed that he suffered permanent lung, pluera and other asbestos related diseases, as well as emotional and mental distress as a result of his exposure to defendant's asbestos products while he was employed at Borden Chemical Co.

from 1964 to 1977 and is seeking relief by asking for general and punitive damages.

Defendant Union Carbide Corp. is a manufacturer of asbestos. Harrison & Crosfield (Pacific) Inc. is a distributor of asbestos.

This case came on for trial on January 31, 1984. During the course of trial, a number of medical treatises were utilized by both plaintiff's and defendants' expert witnesses to show a basis upon what their opinions were formed. Among these were a chart of statements, taken verbatim, contained in the Journal of the American Medical Association, which was referred to during and subsequent to trial, as the JAMA Chart. This chart was a blow-up of one part of one page, taken verbatim, from the JAMA article. This blow-up was three feet five inches wide by five feet seven and a half inches high. This chart, later to become court's exhibit 2 was neither

marked nor offered as a defense exhibit.

All of the medical articles that were admitted in evidence were admitted pursuant to the "Learned Treatise" exception to the hearsay Rule 803(18) of the Federal Rules of Evidence. Tr. 925, 926, 933. (App.11). This evidence was admitted under a specific stipulation that under FRE 803(18) that none of the medical articles were to go to the jury. Tr. 925, 926. (App. 11).

The American Medical Journal was offered as defendant's exhibit 138 under 803 (18). Tr. 932, 933. (App.12). Based on the above stipulation, the trial court received the pro-offered exhibits. Tr. 933.

The JAMA article was admitted in evidence under Rule 803(18) of the Federal Rules of Evidence. It also was admitted subject to an agreement made in open court between plaintiff's counsel, defendants' counsel and noted and participated in by the court, that all medical articles that

were being offered pursuant to FRE 803(18) would not go to the jury. Tr. 925. (App. 11). When the JAMA article was subsequently offered, defendants' counsel specifically stated that it was being offered pursuant to 803(18). Tr. 932, 933. (App. 12). This agreement is reflected below by the parties, Defendant's counsel Mr. Blackhurst, Plaintiff's counsel Mr. Jensen and the court:

MR. BLACKHURST: "What I think ought to happen on all of the medical articles that are being offered, that provided that they come in under Federal Rule of Evidence 803, that I think they're admissable, but what that means, at least it's my understanding, that they--the documents themselves do not go to the jury. I think it's Federal Rule 803, the exception to the hearsay rule, and its subsection 18 about learned treatises that expert witnesses rely upon."

MR. JENSEN: "That's agreed."

THE COURT: "All right."

MR. BLACKHURST: "Then number 10 is the--is Dr. Becklake's chart and I think that's the same thing. It comes in under 803(18) <u>but the chart doesn't go to the jury.</u>" (emphasis added)

THE COURT: "In other words, you can use any part of it you want to in argument but it doesn't go back to the jury, and that's agreed." (emphasis added).

Other references were made to this agreement. Tr. 929, 933.

MR. BLACKHURST: "Number 20 is the Seba drawing up there and I think that comes in under 803(18) again, so it's admitted, but it doesn's go to the jury." (emphasis added) (App.13)

Again, Tr. 932, 933.

MR. BLACKHURST: "All right, 138 is the American Medical Association Journal, which the defendant's experts have relied upon and I offer that under 803(18)." (App. 12).

MR. JENSEN: "No objection under 803(18)."

After the jury had retired at 8:30a.m. Feb.8, 1984, the court read to counsel a note from the jury which requested, inter alia, that it be provided with the JAMA Chart, in the following language:

"We the members of the jury would like to request the JAMA Chart that indicated the time period of asbestos related problems in the body."

Tr. 1090. (App. 14).

After hearing initial argument from counsel (Tr. 1091, 1092, the court announced that the JAMA chart would not be provided to the jury, Tr. 1092, 1093, stating:

> THE COURT: "Okay, well, there was an agreement to have these admitted under Rule 803(18) and they, under that rule, they are in evidence but only to the extent of being used in court and used in arguments, so I'm just going to tell them they can't have them."
> (App.15).

Defendants then argued further on the matter, citing, as authority the dicta in United States v. Mangan, 575 F.2d, 48 (2nd Cir. 1978) and the court reversed its prior position and allowed the JAMA chart to go to the jury, over plaintiff's objections. Tr. 1092 to 1097. (App. 16), without addressing the objections of plaintiff's counsel as to the stipulation and did not state or give any reason, for not giving weight and effect to the stipulation.

Further references and reminders to the trial court of the agreement that the

medical articles would not go to the jury occurred during argument on whether the JAMA Chart would be sent to the jury as they had requested. When plaintiff's counsel responding to defendant's suggestion to let the jury see the chart and read the experts testimony to them stated:

MR. JENSEN: "Absolutely not, I'd like to--you know, first of all, we had an agreement by defense counsel about that offer, the way they offered them."

Tr. 1092. (App. 16).

Again further argument:

MR. JENSEN: "Well, I'm opposed to giving them the chart, the JAMA chart, because frankly <u>these gentlemen made an agreement to the contrary</u>." (emphasis added)

Tr. 1095, 1096. (App. 16)

The trial court also failed to state any reason for not enforcing the stipulation or giving it any weight and effect when it denied plaintiff's Motion for New Trial and to Alter Judgment on March 14, 1985. (App. 2).

THE NINTH CIRCUIT APPEAL

On appeal, appellant Lundy in his opening brief, acting pro se, argued, inter alia, to the effect that the admission to the jury, during it's deliberations, over objections of trial counsel, of a chart that contained statements contained in a learned treatise was harmful and prejudicial error, and that he had been deprived of his substantial rights to a fair trial, in that inadmissable hearsay evidence was admitted to the jury as an exhibit, in violation of the mandatory provisions of FRE 803(18). App. 11.

Citing as authority United States v. An Article of Drug, 661 F2d 742 (9th Cir. 1981), United States v. Mangan, 575 F2d 32 (2nd Cir. 1978), United States v. Phillips, 515 F.Supp. 758 (E.D. Ky. 1981).

Appellant further argued that it was error for the trial court to apply discretion in sending the chart to the jury, in

that the Rule of Law FRE 803(18) gave the Court no discretion as to whether to admit the chart, and that by exercising discretion where no discretion was available the trial court thereby committed error.

Appellant also argued in his opening brief that the agreement between the parties, that was made in open court, that none of the medical articles were to go to the jury was a stipulation that was absolute and unequivocal, that could not be disregarded or set aside and that it was binding on the parties and the court. Cited as authority for the above were case law from the United States Supreme Court and other Federal Circuits. In which all of these courts held stipulations to be binding and that the courts were bound to enforce them.

In appellants reply brief he again raised the question of the stipulation and it's binding effect on the parties and the court in answer to defendant's brief, of

the harmful and prejudicial effects of the court ignoring the stipulation and that his substantial rights were thus affected and again directed the appellate court to the case law he had cited in his opening brief as to the stipulation.

On March 5, 1985 the Ninth Circuit issued an unpublished Memorandum decision affirming the decision of the district court. App. 3 . The Ninth Circuit in this Memorandum Decision, assigned as the standard of review that of an abuse of discretion where an evidentiary question is involved. The Ninth Circuit then went on to find that the trial courts decision in this case to allow the chart to go to the jury <u>was error</u>, in view of the fact that it was part of a learned treatise, that was restricted from going to the jury under FRE 803(18). App. 3 pg.3 The Ninth Circuit then went on in it's Memorandum decision of March 5, 1985 to find that the error committed in the trial

court to be harmless error, even in view of the fact that, defendant's counsel, indicated below, that the chart was a principal piece of evidence upon which they were relying, the Ninth Circuit also noted that the trial court, declared it's belief to be that the jury probably considered the chart significant. The Ninth Circuit continued, stating, that while both of these statements were no doubt important, that after complete review of the record that the outcome would have been the same, with or without the chart. Citing as its sole reason for this conclusion, Quote, "We agree with the district court that the overwhelming evidence relating to appellant's previous long term employment as an asbestos worker destroyed the causitive factor in his case against appellees."

Appellant then filed a Petition for Rehearing and Suggestion for Rehearing In Banc, on March 16, 1985, pointing out that

the conclusion of the Court of appellant's long term exposure to asbestos was error, in that it was totally not supported by the evidence at trial nor by the record. At this time appellant again raised the issue of the stipulation and it's binding effects on the parties, and the fact that the court was bound to enforce it. Citing as authority additional cases, among which was another case from the United States Supreme Court.

The Ninth Circuit then issued an Order on May 23, 1985 Denying (appellant's) Petition for Rehearing, and Amending their Memorandum Decision of March 5, 1985, App. 4. in which the Ninth Circuit deleted the reason originally cited for affirming the trial court and stated instead, that after full review of the record, that they found the error of the chart going to the jury to be harmless error, because the chart had been on display in the courtroom and be-

cause it had been explained to the jury by the experts. The court went on to state that their decision was fortified by the language in FRE 103(a) that "Error may not be predicated upon a ruling which admits or excludes evidence unless a substantial right of the party is affected. App. 4.

On June 6, 1985 appellant filed a Petition for Reconsideration and Rehearing in view of the courts Amended Memorandum of May 23, 1985, pointing out to the court, that the standard of review that they had assigned to the error of the trial court in sending the chart to the jury "an abuse of discretion" was incorrect, in that before an abuse of discretion can occur that discretion must be available and that under the mandatory provisions of FRE 803(18) and because plaintiff had a substantive and absolute and fundamental right to have the stipulation enforced that the trial court

was without any discretion in the matter, in that the courts are bound to enforce stipulations freely entered into, and as a consequence the error should be assigned as plain error.

Appellant also pointed out to the court that to fail to give weight and effect and otherwise enforce a stipulation, without stating any reason, is to deny appellant Due Process citing Hoffman-LaRoche Inc. v. Richard G. Kleindienst, 478 F2d 1 (3rd Cir. 1973).

Appellant further pointed out to the court that their conclusion that the error was harmless because the chart had been seen in court and explained by the experts was not justified in view of:

1. The chart had not been read in it's entirety nor fully explained by the experts and that the record supported this position.

2. That the jury relied on the chart as evidence. That this also was supported by

the record particularly the jury's articulated request for the JAMA chart that dramatically illustrated the reliance that the jury was placing on the JAMA chart as evidence. Pointing out to the court the jury's note for the JAMA chart as follows, "We the members of the jury would like to request the JAMA chart that indicated the time period of asbestos related problems in the body." Tr. 1090-91. App. 14.

3. Pointing out to the court that the intent of the parties in making the stipulation was because of the harmful effect of the jury recieving the medical articles.

4. The statement of defendant's counsel when argueing for the chart to go to the jury, that it was a principal piece of evidence and something that they were relying heavily on. Tr. 1097. App. 17.

5. The objections of plaintiff's trial counsel that the chart should not go to the jury. Tr. 1092, 1094-96. App. 16.

6. The statement of the trial court that it had no doubt that the jury found it (the JAMA chart) significant. App.18.

7. The fact that the trial court initially ruled that the chart could not go to the jury Tr. 1092, 1093, App.15., and then reversed itself and allowed the chart to be sent to the jury. Tr. 1097. App. 20.

Appellant further pointed out that in not enforceing the stipulation that aside from it being harmful and prejudicial to appellant that it was also harmful to the judicial process as well, in that it can well affect the litagation process as well.

On July 1, 1985 the Ninth Circuit issued an Order Denying appellant's Motion for Reconsideration with no comment as to the issues raised in the Motion. App.5.

Nowhere in the decisions rendered in this case has the Ninth Circuit mentioned or addressed the issue of the stipulation that appellant has repeatedly raised, or

addressed the fact that appellant's substantial and fundamental rights been denied in that the stipulation of the parties was not enforced by the trial court. The Ninth Circuit has, as with the trial court, simply ignored and disregarded the stipulation and all issues fairly raised by it, and has failed to give any reason whatsoever for doing so.

SUBSTANTIAL & COMPELLING REASONS TO GRANT THE WRIT OF CERTIORARI

Plenary review by this court is warranted in that this case satisfies the standards which ordinarily govern discretionary review under Rule 17 of this Court's Rules. The decision rendered by the Ninth Circuit in this case conflicts with those of at least five other Federal Circuits and is in direct conflict to the controlling case law as laid down by the United States Supreme Court. It is also in direct conflict with state court decisions and with it's own decisions in the Ninth Circuit on the same subject.

The Ninth Circuit decision in this case has the effect of denial of Due Process and Equal Protection of the law to appellant and appears to sanction the denial of Due Process in the lower court as well.

The Ninth Circuit has decided a ques-

tion of a standard of review of error, that should be clarified and standardized by this court.

The Ninth Circuit has decided a question of harmful and prejudical error in a manner that conflicts with other Federal Courts and the United States Supreme Court. the issues are indeed substantial.

1. The effect of the Ninth Circuits decision is substantial and if left undisturbed will have significant harmful consequences.

To let the Ninth Circuit decision in this case stand is to undermine the authority of the United States Supreme Court itself, in that this Court has long held that stipulations are binding on the part- and the Court's. See: H. Hackfield & Co v. United States, 197 U.S. 442, 446 25 S.Ct. 456 (1905).

If parties to a stipulation are permitted to erase commitments made to the court

and then ignore and otherwise not honor stipulations freely entered into as the winds change, the litagation and judicial process will suffer greatly. The net result can only be that parties litagnet will be hesitant to enter into stipulations resulting in lengthier trials and further overcrowding and encumbering the courts. Further to not enforce a valid stipulation of the parties that was participated in by the court is to place the Court's own honor, dignity and integrity in question. See: Webster v. Webster, 14 P.2d 523. Cathcart v. Gregory, 113 P.2d 894, 898.

The Ninth Circuit decision in this case, in which it fails to enforce or even address the issue of the stipulation on appeal is in direct conflict with the decision of the following Federal Circuit Courts and if allowed to stand, may well erode the uniformity of decisions in the court's further.

The Third Circuit in Hoffman-LaRoche Inc. v. Kleindienst,478 F.2d 1 held, at pg. 13 (footnote 16) that stipulations are binding on both parties and the (hearings) Commissioner, citing as authority H. Hackfield & Co. v. United States, 197 U.S. 442 25 S. Ct. 456. Osborne v. United States, 351 F.2d 111 (8th Cir. 1965), Burnstein v. United States, 232 F.2d 19 (8th Cir. 1956), United States v. Kahriger, 210 F.2d 565 (3rd Cir. 1954).

The Fourth Circuit in United States v. Webb, 595 F.2d 203 (4th Cir. 1979) reafirmed it's position that stipulations of attorneys made during a trial may not be disregarded or set aside at will. (pg. 206).

The Fifth Circuit in A.Duda & Sons Coaperative Assoc. v. United States, 504 F.2d 970 (5th Cir. 1974) held that stipulations of fact fairly entered into are controlling and conclusive and the courts are bound to enforce them. In Thrash v. O'Donnell, 448

F.2d 886 the Fifth Circuit also held that parties who enter into stipulations are bound thereby untill such stipulation is modified.

The Eighth Circuit likewise held in Osborne v. United States, 351 F.2d 111,120, that stipulations fairly entered into are controlling and conclusive and courts are bound to enforce them. Citing Burnstein v. United States, 232 F.2d 19, 22; (8th Cir.) and again H. Hackfield & Co. v. United States, 197 U.S. 442, 446, and 83 C.J.S. stipulations § § 17 and 23.

The Tenth Circuit in United States v. Northern Colorado Water Conservancy Dist., 608 F.2d 422, 430, 431 (1979), also held that they could not overlook or disregard stipulations which are absolute and unequivocal, and that stipulations of attorneys may not be disregarded or set aside at will. The Tenth Circuit in this case also cited Colorado River Water Conservation Dist. v.

Bar Fortyseven Co., 579 P.2d 636 (Colo. 1978), where the Colo. Supreme Court, sitting en banc, held that a water court acted erroneously, arbitrarily and capriciously in refusing to give effect to a stipulation of parties in settlement of change in water rights without giveing reasons to support such refusal.

The Tenth Circuit reafirmed it's position in 1980, that stipulations of attorneys made during trial can not be disregarded or set aside at will, in Lyles v. American Hoist & Derrick Co., 614 F.2d 691, 694 (1980).

In addition to the above the Ninth Cir. in Herrera v. Herrera Debtors, Bkrcy App. 23 B.R. 796, 797, (9th Cir. 1982) held that stipulations made in open court are as binding on the parties as if reduced to writing and formally executed. Citing 83 C.J.S. Stipulations § § 4, 6, United States v. Ricks, 475 F.2d 1326 (C.A.D.C. 1973),

Harris v. Spinali Auto Sales Inc., 240 Cal. App. 2d 447, 49 Cal. Rptr. 610.

From the foregoing above it is clearly obvious that the Federal Courts hold that stipulations are binding, and that the Courts are bound to enforce them. The Ninth Circuit, in failing to enforce the stipulation and otherwise ignoring it, is contradicting these other Federal Court's including the United States Supreme Court, and in so doing undermines these decisions, and is opening the door to controversey and a lack of uniformity in this very important area of the law that has been well established over the preceeding years.

In addition to the above view of stipulations by the Federal Courts it should be noted that many, if not all, of the individual States hold that stipulations are binding. Among these State Court decisions is that of the Supreme Court of California in Webster v. Webster, 14 P.2d 522, 523

(1932). A divorce case in which the Court, sitting en banc, held that a stipulation made in open court constitutes "not only an agreement between the parties, but between them and the court, which the latter is bound to enforce not only for the benefit of the party interested,---but for the protection of it's own honor and dignity." This case has been widely cited by other courts and was cited by the U.S. Supreme Court in Richfield Oil Corp. v. State Board, 392 U.S. 69, 73, (1946) at footnote (1) pg. 73.

The importance of State Court decisions holding stipulations to be binding is that in a diversity case, such as this, that the law of the forum state is controlling. Here the forum state is Oregon and under Oregon Law stipulations are binding. The Supreme Court of Oregon held in State v. Davis, 72 P 317, 318, (1903) that stipulations are as binding upon the State as it

would be on a private individual.

This is still held to be the controlling law in Oregon, as to stipulations.

As a consequence of the above it is evident that the Ninth Circuit decision in this case is also in conflict with the controlling law of the forum state that holds stipulations to be binding.

The Ninth Circuit decision in this case, if left undisturbed, will change the long term historical meaning and significance of the terms, binding and bound, as used by the court's of the land, and will leave the question open to speculation by parties on both sides of an issue in the future, when stipulations are not enforced.

2. THE WRIT OF CERTIORARI SHOULD ISSUE BECAUSE OF DENIAL OF DUE PROCESS AND EQUAL PROTECTION OF THE LAW, IN THIS CASE.

The Ninth Circuit decision in this case should not be allowed to stand undis-

turbed, in that appellant's constitutional rights to due process and equal protection of the law, under Section (1) of the Fourteenth Amendment to the Constitution of the United States, which states in it's entirety:

> Section 1. "All persons born or naturalized in the United States, and subject to the jurisdiction therof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunites of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Appellant had a substantial, fundamental and absolute right, to have the stipulation, that was entered into at trial, given full wieght and effect and to be enforced by the trial court, absent a plain case of fraud, mistake, or oppression.

The trial court in ignoreing, disregarding, and otherwise setting aside the

stipulation of the parties, without stating any reason for doing so, denied to appellant his substantial and fundamental right to have the stipulation enforced, and in so doing appellant was denied Due Process under the law.

Appellant's substantial and fundamental rights were established, in that the stipulation was binding on the parties,and the court was bound to enforce it, as evidenced by the previously mentioned Federal and State Law pertaining to stipulations, and appellant had a fundamental and absolute right to have it enforced.

The trial court in sending a portion of a learned treatise to the jury, during deliberations, over objections of counsel and not only in violation of the Federal Rules of Evidence, particularly FRE 803(18) acted erroneously, arbitrarily and capriciously. As a consequence of the above Appellant was denied fundamental fairness in the

trial court. As authority for the above Appellant respectfully directs the court's attention to: Constitutional Law, FPD 3d 541-545 Key 251, 251.1, & Constitutional Law, FPD 3d Key 318,2, See also: Royal Typewriter Co.v. N.L.R.B., 533 F.2d 1030 (C.A. 8 Cir. 1976). In which the court held that due process to be effective must be accorded at meaningful time and in meaningful manner.

Due Process expresses requirement of fundamental fairness. U.S.C.A. Const. Am. end. 14., Lassiter v. Dept. of Social Services of Durham County, N.C., 101 S.Ct. 2153, 452 U.S. 18, 68 L.Ed. 2d 640.

Denial of due process in the Ninth Circuit on appeal is essentialy the same as in the trial court, in that the appellate court ignored and disregarded the stipulation in the same manner as the trial court and failed to acknowledge the binding effect on the parties and the Court, without

giving any reasons for doing so, despite the fact that appellant had a substantial and fundamental right to have the stipulation enforced on appeal as evidenced by the foregoing court decisions cited in the previous section.

Appellant not only contends that he was denied due process by the Ninth Circuit as noted above, but was also denied equal protection of the law by the Ninth Circuit, in that the established case law as to the binding effect of stipulations, in effect, in the Ninth Circuit, was not applied to this case.

The controlling law as to stipulations in the Ninth Circuit is reflected in Herrera v. Herrera Debtors, Bkrpcy. App. 23 B.R. 796, 797, ((9th Cir. 1982). In Herrera the Ninth Circuit held at pg. 797, that "Stipulations made in open court are as binding on the parties as if reduced to writing and formally executed." Citing 83

C.J.S. Stipulations, § § 4, 6, United States v. Ricks, (C.A.D.C. 1973) 475 F.2d 1326, Harris v. Spinali Auto Sales Inc., 240 Cal. Rpts. 610.

The Court further commented in Herrera "In attempting to evade the stipulation, Mr. Coben not only harms the judicial process but demeans himself as an attorney at law."

From the foregoing it is obvious that the case law, as to the binding effect of stipulations, in the Ninth Circuit was not given equal application to appellant in this case, and he has thus been denied equal protection of the law, in that he had an absolute and fundamental right under Section 1 of the Fourteenth Amendment to have the law equally applied.

3. THE NINTH CIRCUIT HAS INCORRECTLY ASSIGNED THE STANDARD OF REVIEW OF THE ERROR AS AN ABUSE OF DISCRETION, AND ERRED IN FINDING THE ERROR OF THE

TRIAL COURT TO BE HARMLESS ERROR.

Appellant respectfully submits that the Ninth Circuit erred in assigning, an abuse of discretion, as the standard of review in this case, in that the trial court was totally and completely without any discretion to send the chart to the jury during their deliberations and in excercising discretion the trial court committed plain error.

The chart in question was a blow-up portion of a part of one page of a medical learned treatise that was used at trial subject to the Federal Rules of Evidence, specificaly FRE 803(18). The Rule provides in it's entirety:

FEDERAL RULE OF EVIDENCE 803(18)

> To the extent called to the attention of an expert witness upon cross-examination or relied upon by him in direct examination, statements contained in published treatises, periodicals, or pamphlets on a subject of history, medicine, or other science or art, established as a reliable authority by the testimony or ad-

> mission of the witness or by other expert testimony or by judicial notice. If admitted, the statements may be read into evidence but may not be received as exhibits. (emphasis added).

Here the Rule of Law 803(18) gave the court no discretion as to whether to admit the chart. The last sentence of FRE 803 (18) is clearly mandatory and not discretionary.

The Ninth Circuit correctly held that the sending to the jury, during their deliberations, a chart that was a part of a Medical Learned Treatise was error. However the Ninth Circuit in assigning the error as an abuse of discretion, erred, in that it apparantly overlooked the fact that before an abuse of discretion can occur discretion must be available to abuse. Here it is abundantly clear that no discretion was available to the court, in that FRE 803 (18) is mandatory and not discretionary, thus the error must be assigned as plain error.

In addition to the fact that the court was without discretion under FRE 803(18), is the fact, that under the stipulation the court was also without discretion due to the binding effect of the stipulation on the court. If for some reason discretion had been available to the court under FRE 803(18) it was most certainly eliminated by the binding effect of the stipulation on the court. As a result of the above it is obvious that where no discretion was available, that the error must be assigned as other than an abuse of discretion.

The Ninth Circuit decision finding the error to be harmless is clearly erroneous and is not supported by the record. It can hardly be said that the error is harmless in view of the great reliance that the jury and defendant's were placing on the chart as direct evidence. The JAMA chart was hearsay and as such could not be considered

by the jury as evidence.

The fact that the jury considered the JAMA chart as evidence is dramaticly illustrated by the jury's articulated request for the JAMA chart, and also illustrates the reliance that the jury was placing on the chart as evidence. The jury's note for the JAMA chart was as follows: "We the members of the jury would like to request the JAMA chart that indicated the time period of asbestos related problems in the body." Tr. 1090-1091. App. 14. This request by the jury, without question shows that the jury was relying on the chart as evidence. It can not be reasonably concluded that the error of the JAMA chart going to the jury is harmless error in view of:

1. The fact that the parties stipulated that the medical articles would not go to the jury. Presumably this was because both parties were concerned about the harmful effects of the jury recieving the medi-

cal articles. Tr.925-926. App.15, pg.A25.

2. The request for the JAMA chart from the jury, which showed reliance on the chart as evidence. Tr.1090-1091. App.14.

3. Defendant's, when argueing for the chart to go to the jury, stated that it was a principal piece of evidence that defendant's were relying heavily on, Tr.1097. App.17. This clearly shows that defendant's were submitting the chart, which was hearsay, to the jury as direct evidence. Principal as used in this context, means primary and most important. This statement certainly shows the importance of the JAMA chart, and that defendant's were not relying on the chart as an aide to show what thier experts based thier opinions on, which is the intent and purpose of FRE 803(18) as it applies to learned treatises but instead the JAMA chart, which was inadmissable hearsay, was being used deliberatly as direct evidence to the jury.

4. The objection of plaintiff's counsel that the JAMA chart should not go to the jury. Tr. 1092, 1095, 1096. App.16.

5. The statement of the trial court that it had no doubt that the jury found it (the JAMA chart) significant. Tr.1115. App. 18.

6. The fact that the trial court initialy ruled that the chart could not go in, Tr. 1092, 1093, App. 15, and then reversed itself. Tr. 1097. App. 20.

7. The fact that defendandant's arguments to send the chart to the jury, were convincing enough to cause the trial court to change it's mind and allow the chart to be sent to the jury, after it had already ruled that the jury could not have it (App. 15 & 20) is the strongest kind of proof that the chart was material and that the court found it to be so. See: 66 C.J.S. § 40 (b) pg. 133-134.

The arguments of defendants to send

the chart to the jury, induced the error and they should not now be permitted to argue that the error was harmless in view of their role in creating the error.

In view of all the foregoing, it is obvious that the error of the chart going to the jury has been harmful and prejudicial to appellant and that his substantial rights have been greatly affected.

CONCLUSION

For the foregoing reasons, petitioner respectfully submits, that the issues are substantial and have broad public significance and requests that this court grant the Writ of Certiorari and that this Court reverse the decision of the Court of Appeals for the Ninth Circuit.

Respectfully submitted

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Appellant Pro Se
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App.1

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF OREGON

Civil No. 79-821 FR

JUDGMENT

KENNETH J. LUNDY, Plaintiff, v. UNION CARBIDE Corp. et al, Defendants.

This action came on for trial before The Honorable Helen J. Frye on January 31, 1984. Plaintiff was present and was represented by David Jensen and Robert Sweeney, his attorneys and defendants were represented by Jerard S. Weigler and Steven K. Blackhurst, their attorneys A jury was duly empaneled and sworn and heard arguments of counsel, testimony presented by the witnesses and considered evidence and exhibits received by the court.

On February 7, 1984, after being fully instructed by the court, the jury retired to consider the evidence and thereafter answered the first written interrogatory submitted to it as follows:

"We the jury duly empanelled and sworn to try the above-entitled case, unanimously answer each of the following questions:

1. Was Kenneth Lundy's asbestosis caused by his exposure to Calidria, the product used by Borden Chemical Company during the time plaintiff was employed by Borden Chemical Company?

No (yes or no)

(If your answer to this question is No your verdict is for the defendants. Your foreperson should sign the verdict form and signal the bailiff. If your answer to this question is Yes, proceed to question number 2.). . .

DATED this 8th day of February, 1984

/s/ John Vilhouer"
Foreperson

Based upon the record,

IT IS HEREBY ORDERED that this action dismissed.

DATED this 9 day of February, 1984.

U.S. District Judge

Presented By:

Jerard S. Weigler, of attorneys for Defen.

UNITED STATES DISTRICT COURT

DISTRICT OF OREGON

CIVIL MINUTES-GENERAL

Case No. Civ. 79-821FR. Date 3/14/84

Title KENNETH LUNDY v. UNION CARBIDE

DOCKET ENTRY

Record of order denying pltf's Motion for New Trial & to Alter Judgment.

PRESENT: HON. Helen J. Frye, JUDGE

M. DeLap, Deputy Clerk

PROCEEDINGS:

cc: Chambers

UNITED STATES COURT OF APPEALS

NINTH CIRCUIT

FILED: MAR. 5, 1985. PHILLIP B. WINBERRY, CLERK, U.S. COURT OF APPEALS.

KENNETH J. LUNDY, Appellant, v. UNION CARBIDE CORP., et al. No. 84-3757

D C CIV. 79-821 FR. MEMORANDUM*

Appeal from the United States District Court, District of Oregon. The Honorable Helen Frye, District Judge.

Submitted: January 16, 1985

BEFORE: KILKENNY, GOODWIN And SKOPIL, Circuit Judges

This appeal marks the second time this case has been before us. See Lundy v. Union Carbide Corp., 695 F.2d 394 (CA9 1982). We affirm.

Appellant raises the following issues on appeal: (1) Whether the trial court erred by permitting a medical chart to go into the jury room during deliberations;

(2) Whether the trial court erred by withdrawing appellant's punitive damages claim from the jury's consideration; and (3) Whether the trial court erred by instructing the jury that any damages awarded appellant

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* The panel has concluded that the issues presented by this appeal do not meet the standards set by Rule 21 of the Rules of this Court for disposition by written opinion. Accordingly, it is ordered that disposition be by memorandum, forgoing publication in the Federal Reporter, and that this memorandum may not be cited to or by the courts of this circuit save as provided in Rule 21(c).

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would be untaxable as income to him.

1.

The standard of review where an evidentiary question is involved is that of abuse of discretion. Keogh v. Commissioner, 713 F.2d 496, 499 (CA9 1983).

Statements contained in published, scholarly treatments of certain subjects may be admitted into evidence by reading them into the record, but they should not

be received as exhibits. FRE 803(18). Because they are not received as exhibits, items admitted under FRE 803(18) are not to be taken into the jury room during deliberations. 4 J. Weinstein & M. Berger, Weinstein's Evidence 803(18)(02) at 803-330 and n.11 (1984). Since the chart in question was part of an article admitted under such restrictions, the court's decision to allow the chart to go into the jury room as an exhibit was error, i.e., an abuse of discretion. Cf. United States v. Soulard, 730 F.2d 1292, 1300 (CA9 1984) (tax case involving use of summary charts; held that charts may be used as testimonial aids for witnesses and as visual aids for counsel, but should not be admitted into evidence nor allowed use by jurors during deliberations). This court must now determine whether the error was reversible or merely harmless. See Burgess v. Premier Corp., 727 F.2d 826, 833 (CA9 1984)(evidentiary ruling otherwise

constituting abuse of discretion will not be overturned on appeal if error is harmless).

In addition to the fact that counsel for Union Carbide indicated below that the chart was a principal piece of evidence upon which they were relying, we note also that the district court later declared its belief to be that the jury probably considered the chart significant. While both of these statements are no doubt important, we must examine the complete record to determine whether the jury's verdict was more probably than not untainted by the error. Haddad v. Lockheed California Corp., 720 F.2d 1454, 1459 (CA9 1983).

Our complete review of the record leads us to the conclusion that, with or without the chart, the outcome would have been the same. We agree with the district court that the overwhelming evidence relating to appellant's previous long-term employment

as an asbestos worker destroyed the causative factor in his case against appellees. Thus, while admitting the chart into the jury room was error, the fact that the verdict was more probably than not untainted by the error renders it harmless. Haddad, supra.

Because we conclude that the error was harmless, we need not address Union Carbide's arguments concerning "invited error."

11.

The district court's decision to withdraw the appellant's punitive damages claim from the jury's consideration was based on the court's interpretation of Oregon law. We review de novo. Barclay's Discount Bank, Ltd. v. Levy, 743 F.2d 722, 724-25 (CA9 1984).

A party who has not been awarded actual damages is not entitled to punitive damages under Oregon law. Belleville v. Davis, 262

Or. 387, 405, 498 P.2d 744, 752 (1972); Ryan v. Foster & Marshall, Inc., 556 F.2d 460, 465 (CA9 1977). Because the jury returned a verdict for appellees, the district court's failure to submit the issue to the jury was not reversible error. See, e.g., PSG Co. v. Merrill, Lynch, Pierce, Fenner & Smith, Inc., 417 F.2d 659, 663, (CA9 1969), cert. denied 397 U.S. 918 (1970) (applying Oregon law).

111.

Jury instructions are examined as a whole, United States v. Green, 745 F.2d 12 05, 1209 (CA9 1984), and are reviewable only for an abuse of discretion. Id.; United States v. Tille, 729 F.2d 615,623 (CA9 1984).

Both this court and the Supreme Court of Oregon have expressly approved the use of an instruction similar to the one used below. Burlington Northern, Inc. v. Boxberger, 529 F.2d 284, 297 (CA9 1975); Geris v. Burlington Northern, Inc., 277 Or. 381, 394,561

P.2d 174, 182 (1977). See also Norfolk & W. Ry. v. Liepelt, 444 U.S. 490, 498 (1980) (holding it to be reversible error not to give such an instruction when requested). There was no abuse of discretion.

The decision of the district court is AFFIRMED.

UNITED STATES COURT OF APPEALS

NINTH CIRCUIT

FILED: MAY 23, 1985. PHILLIP B. WINBERRY, CLERK, U.S. COURT OF APPEALS.

KENNETH J. LUNDY, Appellant, v. UNION CARBIDE CORP., et al. No. 84-3757

DC CIV. 79-821 FR.

ORDER DENYING PETITION FOR REHEARING, REJECTING SUGGESTION FOR REHEARING IN BANC, AND MENDING MEMORANDUM

Appeal from the United States District Court, District of Oregon. The Honorable Helen Frye, District Judge.

Submitted: January 16, 1985

BEFORE: KILKENNY, GOODWIN and SKOPIL, Circuit Judges

The memorandum filed on March 5, 1985 is amended by the following deletion and addition: Strike the first full paragraph on page 3, lines 7-16, and substitute the following:

"Our complete review of the record

leads us to the conclusion that, with or without the chart, the outcome would have been the same. The chart had been on open display before the jury for a period of several days prior to submission, and had been the subject of considerable expert testimony. When, during its deliberations, the jury asked for the chart and appellant objected, the appellee suggested that the court could recall the jury and have the expert testimony reread in explanation of the chart. Beyond question, it would have been proper practice for the court to have followed this suggestion. However, the meaning and contents of the chart had already been fully explained to the jury by experts. Thus, and in light of this record we hold that, while sending the chart into the jury room was a violation of the rule, it is most unlikely that it affected the jury's verdict. Because the verdict was more probably than not untainted by the

hearing and to reject the suggestion for rehearing in banc.

The full court has been advised of the suggestion for an in banc rehearing, and no judge of the court has requested a vote on the suggestion for rehearing in banc. FRAP 35(b).

With this deletion and this substitution, the petition for rehearing is denied, and the suggestion for a rehearing in banc is rejected.

It is so ORDERED.

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error, the error was harmless. Haddad, 720 F.2d at 1459.

"Our decision on this issue is fortified by the controlling language of FRE 103 (a), that 'Error may not be predicated upon a ruling which admits or excludes evidence unless a substantial right of the party is affected...' Accord, Hingson v. Pacific Southwest Airlines, 743 F.2d 1408, 1413 (CA9 1984). The appellant must show not only that the district judge abused her discretion, but that the appellant was prejudiced by that ruling, i.e., that a different ruling would more probably than not have altered the verdict. United States v. Portillo , 699 F.2d 461, 464 (CA9 1982), citing United States v. Cook, 608 F.2d 1175, 1183-86 (CA9 1979) (in banc), cert denied 444 U.S. 1034 (1981), and the separate concurrence of Wallace, J., in Cook at 1188."

The panel as constituted in the above case has voted to deny the petition for re-

UNITED STATES COURT OF APPEALS

NINTH CIRCUIT

FILED: JULY 01 1985. PHILLIP B. WINBERRY, CLERK, U.S. COURT OF APPEALS.

KENNETH J. LUNDY, Appellant, v. UNION CARBIDE CORP., et al.

No. 84-3757 DC CIV. 79-821 FR.

ORDER

BEFORE: KILKENNY, GOODWIN and SKOPIL, Circuit Judges.

The appellant's Motion for Reconsideration and for rehearing is denied. His Motion to recall the mandate is granted and he is allowed thirty days from the date of filing of this order in which to file his petition for a writ of certiorari in the Supreme Court of the United States. Judges Kilkenny, Goodwin and Skopil would deny the petition for reconsideration and for rehearing, and Judges Kilkenny and Skopil would grant the petition to recall the mandate and grant the appellant thirty days from the

date of filing of this order in which to apply to the Supreme Court for a writ of certiorari; Judge Goodwin would deny the petition to recall the mandate.

It is so ORDERED.

Kenneth J. Lundy
74557 Lundy Lane
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Notice of Appeal to a Court of Appeals from a judgment on Order of a District Court

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF OREGON

KENNETH J. LUNDY, Plaintiff, v. UNION CARBIDE CORPORATION, a New York corporation; and HARRISONS & CROSFIELD (PACIFIC), INC., a Calif. corporation, Defendants.	Civil No. 79-821 FR NOTICE OF APPEAL

Notice is hereby given that Kenneth J. Lundy, Plaintiff above named, hereby appeals to the United States Court of Appeals for the Ninth Circuit from the final judgment from the Record of Order denying plaintiff's Motion for New Trial and to Alter judgment entered in this action on

the 14th day of March, 1984.

By: _____
Kenneth J. Lundy

SECTION 1. FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION.

Section 1. "All persons born or naturalized in the United States, and subject to the jurisdiction therof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunites of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

"We the jury duly empanelled and sworn to try the above-entitled case, unanimously answer each of the following questions:

1. Was Kenneth Lundy's asbestosis caused by his exposure to Calidria, the product used by Borden Chemical Company during the time plaintiff was employed by Borden Chemical Company?

No (Yes or No)

(If your answer to this question is No your verdict is for the defendants, Your foreperson should sign the verdict form and signal the bailiff. If your answer to this question is Yes, proceed to question No.2).

DATED this 8th day of February, 1984

/s/ John Vilhouer "
Foreperson

Based upon the record,

IT IS HEREBY ORDERED THAT THIS ACTION IS DISMISSED.

DATED this 9 day of February, 1984.

U.S. District Judge

Presented By:

Jerard S. Weigler, Of Attny. for Deft's.

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Attorneys for Plaintiff

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF OREGON

KENNETH J. LUNDY, Plaintiff, v. UNION CARBIDE CORPORATION a New York corporation, et al., Defendants.	Civil No. 79-821 FR MOTION FOR NEW TRIAL AND TO ALTER JUDGMENT Oral argument Required

Pursuant to F.R. Civ.P., Rule 59, plain-

moves for an order:

(1) Granting him a new trial; and

(2) Setting aside the judgment of February 9, 1984.

This motion is supported by the following

memorandum.

Dated, this 16th day of February, 1984.

Davod Jensen
of Attorneys for
Plaintiff

APP. 10

TRANSCRIPT PAGE 1114 Line 24
TO 1115 LINE 8.

THE COURT: All right, I won't make a ruling until I do look at the reply brief, but it's unlikely that I will grant a New Trial.

In light of that, I mean I'm certainly going to consider the reply bried, but in light of what I've said, it's not my policy in a civil case, even though I have the power to make any kind of evidentiary statements to the jurors or in the Court---maybe it's because of my State Trial work, but somehow I don't like that Rule particualrly and I really do like to leave it to the jury and to the advocacy and I thought the advocacy in this case was good on both sides.

APP. 11.

FEDERAL RULE OF EVIDENCE 803(18)

The rule provides, in its entirety:

To the extent called to the attention of an expert witness upon cross-examination or relied upon by him in direct examination, statements contained in published treatises, periodicals, or pamphlets on a subject of history, medicine, or other science or art, established as a reliable authority by the testimony or admission of the witness or by other expert testimony or by judicial notice, If admitted, the statements may be read into evidence but may not be received as exhibits.

APP. 11 CONTINUES

STIPULATION OF PARTIES-TRANSCRIPT PG.925 LINE 9 to LINE 5 PAGE 926

MR. BLACKHURST: ---Monograph, and what I think ought to happen on all of the medical articles that are being offered, that provided that they come in under Fed-

eral Rule of Evidence 803-18, then I think they're admissible. But what that means, at least it's my understanding, that they can be referred to in argument that they--the documents themselves do not go to the jury. I think it's Federal Rule 803, the exception to the hearsay rule, and it's Subsection 18 about learned treatises that expert witnesses rely upon.

MR. JENSEN: That's agreed.

THE COURT: All right.

MR. BLACKHURST: Then Number 10 is the---is Dr. Becklake's chart and I think that's the same thing. It comes in under 803-18 but the chart doesn't go to the jury. (emphasis added).

THE COURT: In other words, you can use any part of it you want to in argument but it doesn't go back to the jury, and that's agreed. (emphasis added). What about the next one, Mr. Jensen?

MR. JENSEN: The Becklake Chart,

Your Honor?

THE COURT: Yes.

MR. JENSEN: Yes, I agree with Mr. Blackhurst.

THE COURT: Okay.

APP. 12

JOURNAL OF THE AMERICAN MEDICAL ASSOCIATION OFFERED - TRANSCRIPT PAGE 932 LINE 25 to LINE 7 PAGE 933.

MR. BLACKHURST: All right, 138 is the American Medical Association Journal which the defendant's experts have relied upon and I offer that under 803-18.

MR. JENSEN: No objection under 803-18.

MR. BLACKHURST: And I think that does it. That's all that we have, Your Honor.

THE COURT: Then there is nothing else to go on the list?

APP. 13

OTHER REFERENCES TO THE AGREEMENT , TRANSCRIPT PAGE 929 LINE 23 to LINE 3 PAGE 930.

(DEFENDANT'S COUNSEL MR. BLACKHURST SPEAKING)

"Number 20 is the SEBA drawing up there and I think that comes in under 803-18 again, so it's admitted, but it doesn't go to the jury."

THE COURT: Are you agreed to that?

MR. JENSEN: Yes.

THE COURT: Okay.

APP. 14.

THE JURY'S REQUEST FOR THE JAMA CHART TRANSCRIPT PAGE 1090 LINE 23 to PAGE 1091 LINE 1.

THE COURT: Okay, And then the second note was: "We the members of the jury would like to request the JAMA chart that indicated the time period of asbestos is-related problems in the body.

THE COURT RECOGNIZING THE FRE 803(18) AGREEMENT, AND INITIAL RULING THE JURY COULD NOT HAVE THE CHART. TRANSCRIPT PAGE 1092 LINE 22 TO LINE 1 PAGE 1093.

THE COURT: Okay. Well, there was an agreement to have these admitted under Rule 803-18 and they, under that rule, they are in evidence but only to the extent of being used in Court and used in arguments, so I'm just going to tell them they can't have them.

APP. 16

PLAINTIFF'S OBJECTION OF THE JAMA CHART GOING TO THE JURY (IN ANSWER TO DEFENDANT'S COUNSEL MR. WEIGLER'S SUGGESTION TO HAVE THE JURY VIEW THE CHART). TRANSCRIPT PG. 1092 LINE 1 TO LINE 7

1. MR. JENSEN: Absolutely not. I'd like to--you know, first of all, we had an agreement by defense counsel about that offer, the way they offered them. And,

secondly, it would be inappropriate to go in and read the testimony of one of their witnesses. It would be just as inappropriate if I wanted to play back part of Bob Sweeney's argument or mine or one of my witnesses.

2. TRANSCRIPT PG. 1095 LINE 25 TO LINE 2 PAGE 1096.

MR. JENSEN: Well, I'm opposed to giving them the chart, the JAMA chart because, frankly, these gentlemen made an agreement to the contrary.

APP.17

DEFENDANT'S STATEMENT THAT THE CHART WAS EVIDENCE THAT THEY AND THE JURY WERE RELYING ON. TRANSCRIPT PAGE 1097 LINE 9 TO 11.

(Defendant's Counsel Mr. Weigler speaking, refering to the JAMA chart)

Now, I know it's distressing to Mr. Jensen that the item of evidence that

they're interested in seems to be an item of evidence that we are relying heavily on.

APP. 18

TRIAL COURT RECOGNIZING THE CHARTS SIGNIFICANCE TO THE JURY. TRANSCRIPT PAGE 1115 LINE 16 TO 21.

(THE COURT SPEAKING)

As I said, I probably am not going to grant a new trial because I did at the request of the jury submit to them sonething that they had seen in Court and wanted to consider again and I have no doubt that they considered it significant and mayne it played a substantial part in the decision they reached.

APP. 19

FEDERAL RULE OF CIVIL PROCEDURE

103 (a)

(a) Effect of erroneous ruling. Error may not be predicated upon a ruling which admits or excludes evidence unless a substantial right of the party is affected.

APP. 20

THE TRIAL COURT ALLOWING THE JAMA CHART TO GO TO THE JURY. TRANSCRIPT 1097 LINE 16 to 19.

THE COURT: All right. Well, I'm going to send in this because they didn't ask for the testimony, this testimony singles out--I mean I think that it would be unfair at this point to send this in. I will send in the JAMA chart.

AFFIDAVIT OF SERVICE

On July 29, 1985, I served the attached Petition for Writ of Certiorari and Appendix, on Defendant's Union Carbide Corp. and Harrisons & Crosfield (Pacific) Inc. by mailing to:

LINDSEY, HART, NEIL & WEIGLER
Suite 700 Columbia Square
111 S.W. Columbia
Portland, Oregon 97201

Attn. Mr. Rick T. Haselton, Atty's of Record for Defendant's

two true and correct copies therof, certified by me as such. I further certify that said copies were placed in a sealed envelope, addressed as stated above; said sealed envelope was then deposited in the United States Post Office in Cottage Grove, Oregon on the 29th day of July 1985, with postage theron fully paid.

Kenneth J. Lundy

Kenneth J. Lundy
74557 Lundy Lane
Cottage Grove, Or.97424
Ph (503) 942-8600
Appellant Petitioner
Pro Se